NO. 2973

United States
Circuit Court of Appeals
For the Ninth Circuit

CYRUS F. SHELDON,

Appellant,

vs.

GUS MESSERSCHMIDT, CHARLES QUACKENBUSH, and THE JUNEAU CONSTRUCTION COMPANY,

Appellees.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA, DIVISION NO. 1.

Brief of Appellant

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ALASKA DAILY EMPIRE PRINT

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STATEMENT OF CASE

At the time of the commencement of this action, the appellant was, and had been for more than seventeen years prior thereto, the owner, by right of continuous possession and occupation and by virtue of Final Certificate No. 06, dated January 11, 1911, issued by the Register of the United States Land Office, at Juneau, Alaska, of a homestead claim within the Juneau, Alaska, Land District, consisting of 47.34 acres of land. The said homestead was situated about one mile Northwest from the City of Juneau, on Gastineau Channel, and extended along, and abutted upon, the meander line at mean high tide of said Gastineau Channel. The homestead of the appellant abuts for a distance of two thousand feet upon, and is bounded by, the waters of Gastineau Channel, an arm of the Pacific Ocean, navigable for vessels of all sizes, and in which the tide ebbs and flows.

The appellees on December 29, 1913, while the appellant was so possessed of the homestead, entered upon the tidelands immediately in front of, and abutting upon, said homestead and took possession of two strips of tidelands, amounting to approximately 106 and 70 feet in length, respectively. They proceeded to drive piles, cap the same and to place improvements thereon, the said im-

provements joining the waterfront boundary of appellant's homestead.

Appellant claims that, by virtue of his homestead claim, for which he holds a final certificate, he is entitled to the use and occupancy of the said tidelands lying in front of his property, and that the obstructions placed on the tidelands in front of his homestead deprive him of the free and unobstructed use and occupancy of the tidelands upon which the structures were placed.

The suit was instituted to have the court decree that appellant was entitled to the free use and occupancy of said tidelands and entitled to exercise riparian and littoral rights over the same. Appellant also asked for an injunction restraining the appellees from permitting the obstructions to remain on the tidelands, from further placing obstructions on said tidelands, or in any manner interfering with appellant's right in the free use and occupancy of said tidelands.

A trial was had, and upon the close of the evidence produced by appellant a non-suit was granted upon motion of counsel for the appellees. Appellant brings this appeal and assigns as error:

I.

The overruling of appellant's demurrer to appellees' answer.

II.

The granting of appellees' motion for a non-

suit at the close of appellant's evidence given in said cause.

III.

Rendering its judgment and decree in favor of the appellees.

ARGUMENT

In order to place appellant's contention plainly and squarely before the court, appellant says that he claims the exclusive right to have the free and unobstructed use of all of the tideland immediately in front of and abutting his upland against all the world except the superior proprietor (which is the United States, as trustee for the future State), and, until the tideland is taken by the superior proprietor for public use, no private person can claim that right for his use as against the appellant.

Pursuant to Congressional action in 1912, the laws of Alaska were compiled, codified, arranged and annotated. At this time it was considered by the lawyers who compiled the laws that

> "The title and domain of the tidewaters and the lands underneath, and the beds and banks of navigable streams in Alaska are held by the United States in trust for the future states to be erected there."
>
> "A homestead entry perfected under the United States land laws, where the land abuts upon the waters of a navigable

stream, gives to the qualified entryman the exclusive right to the use and occupation of the shore land between high and low water mark as against the mere trespasser."

See note to Compiled Laws of Alaska, Sec. 55.

U. S. v. Roth, 2 Alaska, 257; Itid. p. 416;
Gavagan v. Crary, 2 Alaska, 370;
~~Heine~~ *v. Pacific Coast Co.*, 160 Fed. 794.
McCloskey

In view of the foregoing, it would seem that at this time (1912) it was generally conceded and recognized that the upland owner in Alaska had the exclusive right to the use and occupation of the shore land. As will be shown hereafter, this doctrine has remained unchanged.

The first case in Alaska in which the question of the right of possession of the tideland was involved and in which there was a direct adjudication by the courts of Alaska, is that of *Lewis v. Johnson*, 76 Fed. 477.

This case was tried at Juneau in 1896. Plaintiff brought suit against defendant alleging that he was the owner by claim, possession and occupation of a lot in Juneau abutting upon the waters of Gastineau Channel, an arm of the Pacific Ocean, and that defendant had commenced the erection of certain structures on the abutting tideland in front of his lot which, if completed, would destroy or impair the littoral rights of plaintiff incident

to said lot of ground, and prayed for injunctive relief.

Defendant contended, upon demurrer,

> "1. That the upland owner, even in fee simple, has no rights in abutting tidelands by virtue of such ownership; 2. That, granting such rights to exist as incident to ownership in fee, the plaintiffs have no such title to the uplands described in the bill as will vest them with any littoral or riparian rights; and, 3. That the proper remedy is at law and equity ought not to interfere."

District Judge Delaney commenced his decision with the following sentence:

> "The court feels obliged to dissent from all of these propositions."

In further deciding these points, the court used the following language, at page 479:

> "On the contrary, in furtherance of the general policy of the government and within the purview of the act providing a civil government for Alaska (23 Stat. 24, paragraph 8, Sppl. Rev. Stat. 433) and the act of March 3, 1891 (26 Stat. 1095, paragraph 12, Suppl. Rev. Stat. 944), the court will maintain and enforce in behalf of the bona fide settler in actual possession of lands in Alaska all the rights appurtenant or incident to such lands which a title in fee would vest in

> him, saving only the paramount rights of the United States as the sovereign owner of the soil; included within these rights of the settler who holds lands abutting on tidewater is the right of access over and across fronting tidelands to deep water, as now determined by the highest courts of England and this country. The right certainly brings with it the remedy, and where the law side of the court affords no plain, speedy and adequate remedy, as in the case of the erection of structures which impair or destroy this right of access, equity will interfere."

The above case holds that the upland owner, through an injunction, may prevent the placing of structures on the tideland in front of his holding which *impair or destroy* his right of access. The case does not show, and, by inference it would seem by the language used, "impair or destroy," that it is unnecessary to show, that the obstructions would completely cut off the right of access.

The next case directly on this point is

U. S. v. Roth, 2 Alaska, 257

decided in 1904, at Fairbanks.

This was an action for tresspass under Section 67, Penal Code of Alaska. Defendant Roth erected a tent on and occupied a portion of the ground upon that part of the land between high and low water immediately in front of the homestead of C. H.

Heine. These facts were admitted, but defendant offered as a defense the fact that land lying between high and low water in front of a homestead is no part thereof and is not in possession of the homesteader.

The court held that defendant was a tresspasser and used the following language, at page 264:

> "Upon the facts and authorities, I find that by reason of his lawful occupation and possession of his homestead, including the whole of Garden Island, the claimant was in lawful occupation and possession of all the shore lands along its meandered line; that such shore land is a valuable property to which he has an inchoate but exclusive right of possession as against all the world except the sovereign proprietor—the government of the United States as trustee for the future state—that the defendant was and is a trespasser on such shore land and under the stipulated facts is guilty of trespassing on lands or premises in the lawful occupation of another."

Had this case been appealed to the Circuit Court, it would have been most fortunate for many people within the Territory who are situated as is the appellant in this case, because the question would have been adjudicated once for all times.

Since the decision of the *Roth* case, *supra*, the question of littoral rights has been before the

courts in a number of different phases, but we respectfully contend that in none of such cases have the facts been such so as to make it necessary to decide the exact question that appellant now raises.

The last case from our Circuit Court of Appeals,

Worthen Lumber Mills v. Alaska Juneau Gold Mining Co., 229 Fed. 966,

simply held that the plaintiff was entitled to an injunction to prevent the defendant from placing structures on the tideland in front of plaintiff's mill sites which cut off plaintiff's right of ingress and egress to and from said land.

> "The court below found that the appellee had need of access to the navigable waters of Gastineau Channel in connection with its mining plant on the upland, and that to avail itself of this right of access it was necessary to construct a wharf covering the whole space in front of the upland or from the appellee's southerly line to the present Alaska Juneau wharf, and that all of said area is reasonable and necessary to be used in aid of the appellee's ingress and egress to and from such upland. The appellee having, as we have found, the right of access to the navigable waters of the channel, we are not convinced that the court below has by its decree accorded to it a greater or

more extensive right than is reasonable under the circumstances."

Had not the appellee in the above case actually proven that it needed the tideland for the purposes above mentioned, we feel, nevertheless, that the decision of the Circuit Court would have been just the same, for the reason that the structures, as held by the lower court, obstructed the appellee's right of ingress and egress.

The above case is decided, it seems, not so much on the theory that appellee's right of egress from and ingress to its upland would actually be cut off, as that appellee, by virtue of its ownership of upland, was entitled to construct a wharf on the tideland for the purpose, it is true, of receiving freight from ships to be used in its plant, and also for the purpose of storing its freight prior to its being used in the construction and operation of the appellee's mills. So it appears, not only in this case, but in others, that the necessity and reasonableness of the use of the right of egress and ingress is not always the controlling feature. The courts are ready and willing to recognize the doctrine that the upland owner is not to be limited to a strict interpretation of the term "right of egress and ingress."

On the other hand, the equitable doctrine is that the upland owner is deemed to have the first and best right to the tidelands, to use them in con-

nection with the upland in any manner incident and appurtenant.

We realize that the appellees in the case at bar will confront us with the proposition that, unless it is shown the upland owner has an immediate need of the right of access, he has no ground for injunctive relief. But we respectfully submit that in none of the cases involving littoral rights in Alaska has this doctrine ever been established by our courts. As stated before herein, the cases have been decided on other grounds. Some, like the case of

Barron v. Alexander, 206 Fed. 272

wherein it was held,

> "That the owner of a tract of land in Alaska fronting on Chatham Strait, at a point where it is twelve miles wide, held not entitled to an injunction to restrain another from constructing and maintaining a fish trap in the navigable waters in front of said land, shown not to prevent or interfere with his access to the waters of the Strait."

The evidence in the *Barron* case, *supra*, actually showed that the fish trap in question was below the line of low tide and was not on the tideland at all.

Certainly, then, the *Barron* case can be no authority in the case at bar, where it is shown

the structures are on the tideland and, in fact, are partly over the upland. (See evidence of Crowther, Tr. pp. 18, 19):

"Q. What did you find in reference to those structures placed there by the defendants as being in conflict with any of those lines—lines of ordinary high water?

A. The improvements which were pointed out to me by Mr. Sheldon as having been placed there by Mr. Messerschmidt and others were partly on the upland of the Sheldon Homestead and partly on the tidelands abutting the homestead. In other words, a portion of the structure was above the line of ordinary high water and a portion of it was below.

Q. The obstruction you found placed there on the tidelands abutting the upland of the Sheldon Survey No. 375 is an obstruction, isn't it, between the upland and the tidelands or deep water?

A. It is right along the line. The structures placed there in the manner I have already stated are partly on the tidelands and partly on the upland and they cover a portion of the meander line of the frontage of that survey and they consist of piling, capping and platforms."

Also, Tr. p. 26, evidence of Sheldon:

"Q. What is the nature of that obstruction?

A. There is another foundation about 70 feet frontage on the land there, partly above the mean high tide and partly below it, and that consists of posts and caps and floor joists, and they made a little flooring there but it isn't floored over.

Q. Does that constitute an obstrustion?

A. It does."

We have reviewed all the cases arising in Alaska wherein the littoral right was involved, and it appears that the right to an injunction has never been denied where it was shown that the structures would destroy or impair the right of access to deep water. It has not been necessary to show that it cuts off all access.

It is a well established fact and must be admitted that in Alaska the title to the tideland is held in trust by the United States for the future States that may hereafter be created, nevertheless the said tideland is burdened with an easement in favor of the upland owner.

That easement is the right to occupy and use all the tideland included between two lines drawn from the end boundaries of the upland to deep water, used for the purposes of ingress and egress.

This is true, not because of any fixed rule so much as on account of the fact that the easement is incident to the land and runs with the land.

As before stated, this case does not merely involve the question of right of ingress or egress to or from said upland from the navigable waters *at any particular place or point.* And if the upland owner in fee (or, as in this case, with a title equal to a fee) has the right of egress from and ingress to his upland, he has it throughout its entire length abutting and lying on ordinary high tide mark of the shore, and certainly no court can say, nor ever has said, to the upland owner: "While you own all of the upland, you can only go to and come from the navigable waters opposite your upland at certain points or places which the court will fix (and the court will give you only so much of the strip from the tideland for that purpose, and the court will tell you where you should go to and come from the navigable waters to your upland; the remainder of the tideland abutting your upland the court will give to some other person."

To do this would be legislating under the guise of judicial decision, since the undisputed fact is that the tideland really belongs to the people of the future State to be created out of the Territory of Alaska, and the United States cannot, nor can courts, dispose of the tidelands ar-

bitrarily, nor at all, excepting for the public good and then only "upon due compensation" to the upland owner.

Yates v. Milwaukee, 77 U. S. 497

The trial court in the case at bar held the appellant had not made a case for one or all of the following three reasons: (1) Plaintiff did not show the structures placed upon the tideland interfered with plaintiff's right of ingress and egress; (2) That plaintiff's right of ingress and egress is dependent upon a necessity for use; and (3) That the structures would facilitate plaintiff's right of ingress and egress. (See defendant's motion for non-suit, Tr. p. 30).

We think it sufficient to state that the first and third reasons, under the undisputed evidence, could not have been the grounds upon which the non-suit was granted, and that the court held that, inasmuch as appellant had not shown any necessity for the use of the tideland, he could not be granted an injunction.

The undisputed evidence clearly shows that the structures placed on the tideland would actually interfere with appellant's right of ingress and egress. The undisputed evidence also shows that the structures would not facilitate egress and ingress from and to the upland. Therefore, it must be admitted that the reason the non-suit was grant-

ed by the court was based upon the fact that the appellant had failed to show a necessity of use of the right of egress and ingress.

If appellant's right to relief is dependent upon the necessity of use, then surely it is legislation by judicial interpretation, as stated before.

If this is to be the law laid down and applied in Alaska, then the two thousand feet of tideland in front of appellant's homestead can be entered and occupied by squatters, who can erect small cabins which are of no use but for living purposes. Appellant, in the absence of any present and immediate use, must fold his hands and tacitly consent to the taking away of his right of ingress and egress, which he and every settler on the upland has been led to believe could not be taken by anyone save the Government or for a public use, and then only by due compensation.

If that is the law, then after the entire shore land has been squatted upon and occupied, should the appellant desire to exercise the right of ingress and egress in such a manner that it would require the entire tideland (and it must be conceded that there are a number of industries which would require same), appellant would be obliged to proceed in the proper manner to have the tideland vacated. Should he not need the right for a number of years after the occupation of the tideland, when he did have the use and proceeded to

have vacated the tideland, might not he then be met with the doctrine in

Dalton, et al., v. Katalla Co., et al., 4 Alaska, 411,

where it is held as follows:

> "Where an owner of upland bordering on navigable waters in Alaska stands by and permits a railroad company to build its approaches, piers and wharves on tidelands in front of his upland without protest and under an act of Congress authorizing it, he is estopped from having a mandatory injunction requiring the railroad company to remove them. * * *"

The reason why appellant should not be forced into this position is also aptly stated in the case of

West Coast Improvement Co. v. Windsor, 36 Pac. 441.

> "No trespasser should be allowed to occupy or in any manner interfere with the possession of the upland owner of the tidelands on his front until such time as he could exercise his right to purchase the same from the state."

saying, among other things:

> "If the courts should hold that the upland owner had no right to prevent one having no claim whatever from squatting upon tidelands in his front, *we should have such a state of facts existing as would tend*

greatly to the prejudice of the public interests. * * * * *."*
(italics ours.)

We think, and respectfully urge, then, that the right to this easement should be recognized, and that where it is shown, as in this case, the structure actually interfere with the free and unobstructed use of the upland, the right should be protected by injunction.

The structures in the case at bar actually interfere with this use. (See evidence of Crowther, Tr. p. 20):

"Q. Now, the nature and character of the obstruction you refer to, would they prevent ready ingress and egress from the upland to the navigable water?

A. Well, it tends to form an obstruction to ingress and egress. I had to duck my head to get underneath it. A shorter man might not have any trouble.

Q. The piling as it stands there, wouldn't that be an absolute obstruction there and cut off ingress and egress from and to the navigable water?

A. It certainly would have that tendency."

See evidence of Sheldon, Tr. p. 25:

"Q. What is the nature of that structure? Describe it.

A. Well, it is posts and caps and then floor joists on the caps and floored over; platform.

Q. I will ask you whether or not that constitutes and is an obstruction.

A. It surely is.

Q. In what manner would it be an obstruction to you in the enjoyment of your upland in case you desire to reach deep water at low tide?

A. I think it would absolutely cut me off because if they had a right to the possession of it they would undoubtedly keep me off as a trespasser."

Also, evidence of Sheldon, Tr. p. 26:

"Q. Does that constitute an obstruction?

A. It does.

Q. Preventing you from the enjoyment of your land if you desire to reach deep water at low tide?

A. It does."

See, also, evidence of Miller, Tr. p. 29:

"Q. Now, describe to the court what those structures are.

A. Piles and joists and some of them is floored.

Q. Now, I will ask you the character of those structures you saw there, whether they are an obstruction to the up-

land owner if he desires to get out to deep water at low tide—that part covered by these structures.

A. He wouldn't need them if it didn't get too low tide.

Q. At high tide can you get down there?

A. No, you cannot.

Q. Isn't it a fact that these structures would be an obstruction to the use and enjoyment of the uplands by the upland owner if he wanted to get down to deep water from that strip of ground?

A. Yes, it would be an obstruction.

Q. Now, that holds good with all the obstructions placed there by the defendants, don't it?

A. Yes."

This was held to be the law in the case of

Dalton v. Hazlett, 182 Fed. 561

"Where a homestead entry in Alaska was bordered on one side by the meanders of the tide water of Orca Inlet, the entryman, as owner of the upland, though acquiring no title to the shore or soil below high water mark, was entitled to *free and unobstructed access* to the navigable waters, and for that purpose to construct a wharf over such lands without interfer-

ence by third persons claiming the right to use the shore." (Italics ours.)

It has been urged, however, that if the upland owner has the exclusive right by way of easement over the tideland, he could and possibly might stand by and prohibit the use of valuable sites for docks, wharves, piers, etc.

This is answered by the fact that if the upland owner has no personal use of the tideland, he would do just as other prudent business men—provide for the use of same in the same manner that he would of his upland—either rent or sell his right to the use.

Should this point be settled in this manner, surely it would make these rights much more stable than at present, for the reason that a person desiring to occupy the tideland of the upland owner could secure that right by contract from the upland owner and would be in a position where he could not be removed at any time the upland owner desired to use the tideland where such person might have entered and taken possession.

The right to convey the upland owner's right of egress and ingress was referred to in the case of

Decker v. Pacific S. S. Co., 164 Fed. 974

where it is held that the littoral owner can convey his right of access to the navigable waters in front of his premises.

The right to convey the upland owner's right to the tideland was recognized and established in the case of

Miller v. Mendenhall, 19 Am. St. Rep. 219, 221

> "Thereafter the improvement company caused this land, together with the land in front thereof under water, out to the dock line to be surveyed and platted into lots and blocks, piers, slips, avenues, and streets, and caused a plat thereof to be duly made and recorded, under the name of the Bay Front Division of Duluth, and thereafter proceeded to convey divers lots and parcels of the platted land, as well land under water as the dry land, to divers persons, by reference to the recorded plat, and by conveyances of the form set out in the complaint, and containing special covenants and stipulations, as hereinafter mentioned."

The reason why the right of the upland owner to the tideland should be established in the manner indicated is more clearly set forth in *Ensminger v. The People, ex rel*, 47 Ill. 384

> "There is nothing which tends more largely to harmony of society and the prosperity of communities than certainty and stability of rules by which human acts are to be measured."

When, in connection with what we have just stated, it is considered that the states invariably give to the upland owner the first right to purchase the tideland in front of his holding, it gives additional reason why the upland owner should be protected in his easement of ingress and egress. If the upland owner were not now protected, when Alaska shall have been made a State and the State says to the appellant: "You own the upland, and by virtue of your ownership we extend to you the first right to purchase the two thousand feet of tideland in front of your property," appellant will be in the position where if he purchases he will have to expend great sums in order to gain possession of the tideland, for surely the State itself will not cause the tideland to be vacated. It might be necessary to bring an unlimited number of suits because, under our law, defendants in ejectment holding different areas cannot be joined. Appellant might be too poor to do so. If so, or through many other possible reasons, he cannot for a long time gain possession of the tideland, his upland concededly is of less value.

That the policy of the law is to accord to the upland owner the first right to purchase the tideland is clearly established by the case of

Shiveley v. Bowlby, et al., 152 U. S., 38 L. Ed. 350.

"The defendants in error claimed title

to the lands in controversy by deeds executed in behalf of the State of Oregon by a board of commissioners, pursuant to a statute of the state of 1872, as amended by a statute of 1874, which recited that the natural encroachments of the sea upon the land, washing away the shores and shoaling harbors, could be prevented only at great expense by occupying and placing improvements upon the tide and overflow lands belonging to the state, and that it was desirable to offer facilities and encouragement to the owners of the soil abutting on such harbors to make such improvements and therefore enacted that the owner of any land abutting or fronting upon or bounded by the shore of any tidewaters should have the right to purchase the lands belonging to the state in front thereof, and that if he should not do so within three years from the date of the act, they should be open to purchase by any other person who was a citizen and resident of Oregon, after giving notice and opportunity to the owner of the adjoining upland to purchase, and making provisions for securing to persons who had actually made improvements upon tidelands a priority of right so to purchase them."

Also, Laws of Oregon, 1891, p. 594, Sec. 1:

"That the owner or owners of any land abutting or fronting upon or bounded by

> the shore of the Pacific Ocean, or of any bay, harbor or inlet (on the east coast of this state) of the same, and rivers and their bays in which the tide ebbs and flows, within this state, shall have the right to purchase from the state all the tidelands belonging to the state in front of the lands so owned; Provided, that if valuable improvements have been made upon any of the tidelands of this state before the title to the land on the shore shall have passed from the United States, the owner of such improvements shall have the exclusive right to purchase the land so improved extending to low water mark, for the period of three years from the approval of the act to which this is amendatory. * * * ."

The language of this statute clearly indicates that in Oregon in the event the tideland is covered with either wharves or dwelling houses, the owners thereof are given the first right to purchase, providing the improvements were placed upon the tideland before the title to the upland should have passed from the United States. It is readily seen, therefore, that the State of Oregon recognizes in the upland owner when he became such the exclusive right to become the ultimate possessor and owner of the tideland abutting his upland.

The language used by Judge Delaney, in *Lewis, et al., v. Johnson*, 76 Fed. 476, 477, 478, seems at this point to be forcibly applicable.

"After a mature consideration of the subject, the court is not prepared to hold that a bona fide claimant in actual possession and occupation of a lot of ground on the public lands which abuts on the tide water does not take all the littoral or riparian rights of the owner in fee. Reason and equity are on the other side of the question. For a long period of years the federal government has not only conceded to American citizens the right to enter upon, possess and improve public lands, but it has encouraged them so to do by reserving to the bona fide settler the first right to a patent to the land so possessed and improved by him. This policy has obtained in both the legislative and executive branches of the government and has met the approval of the court. * * * It therefore partakes of the nature of a guaranty on the part of the United States that the actual settler and bona fide occupant, within reasonable limits, may perfect his title in fee against all comers whenever the lands are opened by Congress for entry at the land offices. Lands are valuable only for the uses that may be made of them. They may be valuable for residential purposes, for the erection of business blocks, as sites for manufacturing plants, for the water powers afforded by the streams running through them, for the timber growing thereon, for

parks and places of summer resort or recreative doings, for agricultural and grazing purposes, *and for the littoral and riparian privileges appurtenant or incident to them.* The proposition that the courts are not open to the owner in fee for the preservation of any of the rights incident to land and property above mentioned would be dismissed by every court in the civilized world without the grace of a moment's consideration. What tenable ground is there from which to assert that the bona fide settler on and in actual possession of a piece of public land has not an equal right in the forum of the court, and if he may maintain any one of the rights incident to ownership in fee, why not all? The soil is his against all the world except the United States. The neighbor of the owner in fee may not convert the front yard of the latter's residence into a cesspool, nor flood his business house with water, nor undermine the foundation of his manufacturing establishment, nor divert the water falling through his land so as to destroy the water power it affords, nor cut his growing timber, nor convert his park into a stockyard, * * * *nor cut off his access to deep water over abutting tidelands.* Can it be said that the law affords the owner in fee remedies against all these things, but the bona fide settler on and in actual

possession of public lands upon which he may have passed the best years of his life in honest labor to improve and beautify, must sit by and see his lot of ground permanently injured or destroyed because the law gives him no remedy for want of letters patent which he may certainly obtain whenever Congress opens the lands for purchase? If the courts must fold their hands while the settler on public lands is being thus deprived of all that is valuable in the land that he occupies the liberal policy the government has extended to him will be defeated and when the time comes that he may acquire his title, patent may bring to him but a barren estate, stripped of all that may give it value. The court cannot persuade itself that this is the law. On the contrary, in pursuance of the general policy of the government and within the purview of the act providing for a civil government for Alaska and the Act of March 3, 1891, the court will maintain and enforce in behalf of the bona fide settler in actual possession of lands in Alaska all the rights appurtenant or incident to such lands which a title in fee would vest in him, saving only the paramount rights of the United States as the sovereign owner of the soil. Included within these rights of the settler who holds lands abutting on tide water is the right of access over and across front-

ing tidelands to deep water, as now determined by the highest courts of England and this country. The right certainly brings with it the remedy and where the law side of the court affords no plain, speedy and adequate remedy, as in the case of erection of structures which *impair or destroy* this right of access, equity will interfere." (Italics ours.)

The upland owner's right to deal with the tideland as his private property was recognized in

Shiveley v. Bowlby, et al., supra,

"But in consideration of the fact that prior to 1872, as it would seem, these lands had been dealt with as private property and sometimes improved by expensive structures, the acts further provided in such cases that where the bank owner had actually sold the tidelands, when the purchasers of the tidelands from the bank owner, or a previous bank owner, should have the right to purchase from the state. These statutes are based on the idea that the state is the owner of the tidelands and has the right to dispose of them; that there are no rights of upland ownership to interfere with this power to dispose of them and convey private interest therein *except such as the state saw fit to give the adjacent owners* and to acknowledge in them and their grantees when they had dealt with such tidelands as private property,

> subject, of course, to the paramount right of navigation secured to the public. These statutes have been largely acted upon and many titles acquired under them to tide-lands. In the various questions which have come before the judiciary the validity of these statutes has been recognized and taken for granted, though not directly passed upon." (Italics ours.)

The right to the use of the shore land by the upland owner generally has been considered to be more extensive than mere ingress and egress.

> "Legislative authority to extend wharves to the channel of the river was held equivalent to granting a possessory title, if not an absolute interest in the soil."
>
> *Hamlin v. Paripoint Mfg. Co.*, 141 Mass. 51, 57.

> "And if an owner makes a filling or an obstruction in the waters in front of his land, the owner of the adjacent upland may enjoin its continuance or recover in trespass, if not in ejectment."
>
> *Union Depot Co. v. Brunswick*, 31 Minn. 297.

The title to the shore land in Minnesota was in the State, but nevertheless, regardless of the necessity of use of the shoreland, the upland owner

was granted relief against the obstruction placed on the tideland.

> "It is true the right of access and communication with the navigable water belongs exclusively to the riparian owner except with his permission."

Miller v. Menhenhall, 19 Am. St. Rep. 225

> "In many instances, however, right of entry or easement of passage may be found entirely unnecessary, the occupant having other means of reaching the *locus in quo*."

Miller v. Mendenhall, supra.

> "The right of the riparian owner to use and enjoy the improvements made by him in navigable waters fronting on his lands is not, it seems, limited to purposes connected with the actual use of the navigable water, but may extend to any purpose not inconsistent with the public rights."

Hanford v. St. Paul & D. R. R. Co., 43 Minn. 104.

The law recognizes a right of proprietorship over the tideland.

> "But a third person has no right to erect a wharf on land below high water mark on navigable waters without permission of the owner of the adjoining fast land."

Ball v. Slack, 30 Am. Dec. 278

The littoral and riparian rights of the appellant in the case at bar are property rights.

> "This riparian right is property and is valuable, and though it must be enjoyed in due subjection to the rights of the public, it cannot be arbitrarily or capriciously *destroyed or impaired.* It is a right of which when once vested the owner can only be deprived in accordance with established law and, if necessary that it be taken for the public good, upon due compensation."

Yates v. Milwaukee, 10 Wall. 497

Appellees are mere squatters and have no right whatever to occupy the tideland in front of appellant's upland.

> "But though the title is nominally in the state, the common right of the people is limited to ways of public use for the purposes of navigation and fishery, and the riparian owners are permitted to enjoy the remaining rights and privileges in the soil under water beyond their straight boundary lines after conceding to the state all the public rights."

Gould on Waters, Sec. 168

In view of the reasons herein assigned, the law concerning tideland in Alaska and in the

United States generally holding that the littoral right is a property right, and of the obvious fact that this property right cannot be enjoyed by the upland owner, to whom it is a natural right, in conjunction with every person who desires to squat on the tideland and erect cabins and structures of various descriptions, we respectfully submit the judgment rendered by the trial court should be reversed and the relief sought by appellant granted.

Respectfully submitted,

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